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No. 07-771

IN THE

Supreme Court of the United States

RAKESH PATEL,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Petitioner, Rakesh Patel, (hereinafter referred to as the "Petitioner", respectfully moves this Court for an order 1) vacating its denial of the Petition for Writ of Certiorari entered on February 19, 2008, and 2) granting the Petition. As grounds for this motion, the Petitioner restates the argument made in his Writ for Certiorari as well as provides the following additional argument to meet the criteria to grant a petition for rehearing.

CERTIFICATION

There are no cases or proceedings related to this case pending at this time in any United States Court. However, the Petitioner received notice that his "Form ETA" had been certified and that he may file a I-140 Petition with the Citizenship and Immigration Services. As of today, no decision has been rendered with respect to his I-140 even though it had been filed on July 24, 2007.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

Rule 44 of the Rules of the Supreme Court makes clear that rehearing from a denial of a petition for writ of certiorari shall only be granted in instances in which "intervening circumstances of a substantial or controlling effect" exist or to "other substantial grounds not previously presented." Rule 44.2, Rules of the Supreme Court. This Petition for Rehearing is being timely filed within the twenty-five day period of the order denying certiorari.

As previously stated, petitions for rehearing of an order denying certiorari are generally granted in two instances. In our facts, the Petitioner has met both grounds for rehearing.

A. The Petitioner has alleged intervening circumstances of a substantial or controlling effect.

The right to petition for rehearing of an order denying certiorari "is not to be deemed an empty formality as though such petitions will as a matter of course be denied. . . . Accordingly, on an appropriate showing that a substantial matter . . . is to be presented, appropriate opportunity should be given for

doing so." *Flynn v. United States*, 75 S. Ct. 285, 286 (1955) (Frankfurter, J., in chambers). Relying on this principle, the Court has not hesitated to postpone reconsideration of orders denying certiorari where deferral advances the interests of justice and judicial efficiency. *See United States v. Ohio Power Co.*, 351 U.S. 980 (1956) ("continu[ing]" petition for rehearing until the following Term); *see also United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957) (explaining deferral of rehearing petition on ground that "[w]e have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules"); *Vail Mfg. Co. v. NLRB*, 68 S. Ct. 32 (1947) (deferring consideration of petition for rehearing of order denying certiorari).

This Court and courts of appeals have deferred resolution of petitions for rehearing where a decision in pending state court proceedings could alter the analysis. *See* Stern & Gressman, *Supreme Court Practice* 311 (8th ed. 2002) (discussing deferral of petitions for certiorari "until an imminent state court decision is rendered on a controlling issue of state law"); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 99 F.3d 321, 322 (9th Cir. 1996); *cf. Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, 315 U.S. 769, 773 (1942) (granting petition for rehearing on the ground of an intervening decision from a state

court). Similarly, the courts of appeals have deferred consideration of petitions for rehearing in cases where this Court has committed to resolve a potentially determinative legal question. In fact, the courts of appeals even grant petitions for deferral in highly contingent cases where this Court is merely *considering* whether to grant a petition for certiorari in a case that might present similar legal questions. *Barrera-Leyva v. INS*, 653 F.2d 379, 380 (9th Cir. 1981); *Davis v. Roadway Express, Inc.*, 621 F.2d 775, 776 (5th Cir. 1980).

Since the crux of the Petitioner's claims involved violations of federal statutes, more specifically immigration laws and the United States Constitution, the Petitioner's complaint was properly filed in the federal courts. Instead of focusing upon the disturbing facts, the Immigration Court and Third Circuit erroneously denied a proper hearing on the merits. Given the ever changing circumstances regarding immigration, the Petitioner's Writ should have been granted.

Instead of reviewing the extenuating circumstances, the Petitioner's writ was denied on a minor technical issue. The Third Circuit and the BIA denied the Petitioner's constitutional rights to a fair hearing and denied the evidentiary process. The Petitioner should have been allowed to present evi-

dence at another proceeding. A motion to reopen seeks to reopen proceedings so that new evidence can be presented and a new decision entered on a different factual record, normally after a further evidentiary hearing. *Matter of Cerna*, 20 I&N Dec. 399 (1991).

Public policy mandates that any alleged technicality defect does not justify the Petitioner being returned to India where he will be persecuted by the militia, guerillas, and family. The Petitioner was wrongfully denied an evidentiary hearing based on the new evidence. *Cerna, supra*. The Third Circuit accepted the Board of Appeals and Immigration Judge's decision to deny an evidentiary hearing based upon an alleged technicality issue. To deny the hearing was a violation of the Petitioner's due process rights.

Second, to be eligible for withholding of removal under Section 208 of the INA, 8 U.S.C. §1158, the applicant must demonstrate "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]" *See* 8 U.S.C. §1101(a)(42)(A); §241(b)(3) of the INA, 8 U.S.C. §1231(b)(3). In *Lie v. Ashcroft*, 396 F.3d 530 (3d Cir. 2005), we explained that persecution is limited to "threats to life, confinement, torture, and economic

restrictions so severe that they constitute a threat to life or freedom." *Id.* at 536.

The Petitioner proved, and could have presented additional evidence if he was given the opportunity of an evidentiary hearing, that the persecution is more likely than not to occur. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987). An applicant has the burden of establishing eligibility for withholding of removal and relief under the United Nations Convention Against Torture by his or her own credible testimony. *Mulanga v. Ashcroft*, 349 F.3d 123, 133 (3d Cir. 2003) (citing 8 C.F.R. §208.13, 208.16). The Third Circuit deviated from other circuits and other jurisdictions and placed an impermissible burden upon the Petitioner to establish a subjectively genuine and objectively reasonable fear of persecution. *See Gao v. Ashcroft*, 299 F.3d 266, 273 (3d Cir. 2002).

The Petitioner submitted substantial evidence that he had a reasonable fear of being persecuted if he returned to India. He provided substantial and credible evidence that there were railways bombings that led to increased communal tensions and riots in his hometown of Ahmedabad. The bombings were carried out by an Islamist militant organization opposed to Indian rule in Kashmir. Contrary to the Third Circuit's decision, these bombings were not generalized lawlessness and violence between diverse populations. *See Abdille v. Ashcroft*, 242 F.3d

477, 492-492 (3rd Cir. 2001). Under the substantial evidence standard, findings can be reversed only if the evidence presented was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed. *Immigration & Naturalization Serv. v. Elias-Zacarias*, 502 U.S. 478, 481, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992).

The Fifth Amendment of the United States Constitution guarantees due process rights for aliens during hearings, *Baires v. I.N.S.*, 856 F.2d 89 (1988), citing, *Rios-Berrios v. I.N.S.*, 776 F.2d 859, 862 (9th Cir. 1985), including deportation and removal proceedings. *Reno v. Flores*, 507 U.S. 292, 306, 113 S.Ct. 1439 (1993). Due process requires that a petitioner receive a "full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf." *Cano-Merida v. I.N.S.*, 311 F.3d 960, 964 (9th Cir. 2002), *quoting, Colmenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000).

Aliens are entitled by statute and regulation to certain specified procedural protections. *Rios-Berrios* at 862. Aliens are guaranteed a reasonable opportunity to present evidence in their own behalf. 8 U.S.C. §1252(b)(1982); 8 C.F.R. §242.16(a)(1988). Denial of the statutory rights may constitute an abuse of discretion requiring remand. *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (1988); *Castro-Nuno v. INS*, 577 F.2d 577, 578-79 (9th Cir. 1978).

Obviously as the disparity of the circuits heightened for the necessary burden of proof for asylum

under the Convention Against Torture Act, the purpose of direction from the Supreme Court is necessary. By failing to conduct evidentiary hearings, the Petitioner's constitutional due process rights were violated.

The Petitioner has alleged intervening circumstances of a substantial or controlling effect, that is the burden of proof in Convention Against Torture cases.

B. The Petitioner's Writ for Certiorari must be granted for or to "other substantial grounds not previously presented."

There are other substantial grounds that this Honorable Court must consider in reviewing the Petitioner's Writ for Certiorari. A burden of proof that meets constitutional standards must be uniform in applying the United Nations Convention Against Torture ("CAT").

The Third Circuit never examined the constitutional issue. For relief under the CAT, the Petitioner must prove that it is "more likely than not that he...would be tortured if removed to the proposed country of removal", 8 C.F.R. §208.16(c)(2), or more likely than not that, if removed, he would be tortured "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. §208.18. In

order to gain withholding of removal under 8 U.S.C.§1231(b)(3)(A), the Petitioners must prove that there is a "clear probability" that they will be persecuted if they are removed. *INS v. Stevic*, 467 U.S. 407, 424, 104 S. Ct. 2489, 81 L. Ed. 2d 321 (1984). "The question under that standard is whether it is more likely than not that the alien would be subject to persecution." *Id.* "Persecution" requires "threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom." *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993). The persecution had to be "systematic, pervasive, or organized." *Ngure v. Ashcroft*, 367 F.3d 975, 991 (8th Cir. 2004)). Furthermore, the pattern or practice has to be "committed by the Government or forces the Government is either 'unable or unwilling' to control." *Abdulrahman v. Ashcroft*, 330 F.3d 587, 592 (3d Cir. 2003).

Even though the Petitioner submitted substantial evidence with supporting documentation of perilous conditions if he was removed, the Petitioner was denied an evidentiary hearing. An asylum applicant bears the burden of supporting his claim through credible testimony. *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir.2002). The Petitioner met his burden of proof by substantial and credible evidence that there was a strong likelihood that he would be persecuted, harassed and threatened upon his return to India.

The Petitioner should have been granted asylum. He had "compelling reasons for being unwilling or unable to return to the country" based on the severity of the past persecution, or "a reasonable possibility" that he may suffer other serious harm upon repatriation. 8 C.F.R. §208.13(b)(1)(iii)(A), (B). The Petitioner argued in light of the Board's finding that the presumption of well-founded fear was rebutted, 8 C.F.R. § 208.13(b)(1)(iii)(A-B) required it to permit him to demonstrate either compelling reasons why he should not return to her country or that he would suffer serious harm upon removal.

The Petitioner submitted substantial and credible evidence of past fear and the possibility of future harm. Twenty-three exhibits of perilous conditions in and around the Petitioner's area in India coupled with his failure to obey social and religious marriage laws should have been sufficient evidence to meet his burden of proof. The Third Circuit's opinion was in deviation of *In re H*, 21 I. & N. Dec. 337, 348, 1996 WL 291910 (BIA 1996); 42 U.S.C. §1101, et. seq.; *Matter of Mogharrabi*, 191 I.N. 439 (1987); *Matter of B-*, 21 I&N Dec. 66 (BIA 1995); *Matter of S- P-*, 21 I&N Dec. 486 (BIA 1996); *Awolesi v. Ashcroft*, 341 F.3d 227 (2003); *Sotto v. INS*, 748 F.2d 832, 836 (3d Cir.1984).

The decisions below are conflicting. On the one hand, the BIA and Third Circuit acknowledged the

applicable law. But when the Petitioner did in fact meet the threshold as established in Cardoza-Fonseca, 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (a well-founded fear of an event can be when there is less than a 50% chance of the occurrence taking place), an enhanced and impermissible burden was suddenly imposed.

The Supreme Court and lower courts never considered the important issue of burden of proof. Moreover, the affect of a pending application before the Department of Immigration should stay any removal proceedings due to a matter of public policy.

As such, given this additional substantial ground, this Motion must be granted and the merits of the Petition and Motion be addressed by this Court.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, the Petitioner prays that this Honorable Court vacate the order of denial and grant the rehearing of the Writ of Certiorari.

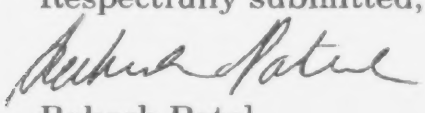
Respectfully submitted,

Rakesh Patel,
The Petitioner
Pro Se

CERTIFICATE OF PETITIONER

The Petitioner certifies that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2

Respectfully submitted,



Rakesh Patel
The Petitioner
Pro Se